Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL, LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 5, 1979.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of Issues	3
Statutes and Rules Involved	4
Statement of the Case	8
A. Procedural History	8
B. Bases of Liability	9
C. The Remedy to Destroy Disease-Causing Organisms	10
1. Collection	10
2. Treatment to Destroy Pathogens	11
D. The Action of the Court of Appeals	14
E. Effluent Limitation	16
Reasons for Granting the Writ	19
I. In Overturning the District's Court's Remedy and Substituting Its Own Remedy Based on Extra-Record Factual Assumptions, the Court of Appeals Usurped the Basic Fact-Finding Function of the District Court	19
A. The Application of the Clearly Erroneous Standard	19
B. The Appellate Court's Failure to Remand	23
II. The Court of Appeals Erroneously Disregarded the Plaintiffs' Remedies Under State Statute and Common Law	26
A. State Statutory and Common Law Claims Should Be Heard	26
B. The Court of Appeals Misunderstood the Statutory Structure of the Clean Water Act	28
Conclusion	31

CITATIONS.

Cases.

Committee for Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) 28

Cordova v. Fox, 351 F. 2d 269 (10th Cir. 1965) 24

DeMarco v. United States, 415 U. S. 449 (1974) 24

Illinois v. Milwaukee, 406 U. S. 91 (1972) 8

Illinois v. Milwaukee, 599 F. 2d 151 (7th Cir. 1979) ... *passim*

Illinois v. Milwaukee, No. 72-C-1253 (N. D. Ill. "Findings of Fact and Conclusions of Law," July 29, 1977) .... *passim*

Ohio v. Wyandotte Chemicals Corp., 410 U. S. 493 (1971) 9, 28

Zenith Radio Corp. v. Hazeltine, 395 U. S. 100 (1969) .. 20

Statutes.

Judicial Code, 28 U. S. C.

§ 1251(a)(1) 8

§ 1254(1) 2

Clean Water Act, 33 U. S. C. §§ 1251 *et seq.*

§ 1251 ..... 27, 29

§ 1311(b)(1)(B) 15, 27, 29

§ 1311(b)(1)(C) 15, 27, 29, 30

§ 1312 ..... 27, 29, 30

§ 1313 ..... 27, 29, 30

§ 1365(e) 28

§ 1370 27-28

Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½ pars. 1001 *et seq.*
§ 1003 8-9
§ 1012(a) 8

Court Rules.

Federal Rules of Civil Procedure
Rule 52(a) 3, 14-15, 19-20, 26, 31

Administrative Regulations.

40 C. F. R. Part 133 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-408.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner is the State of Illinois acting through William J. Scott, Attorney General of Illinois. The petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 26, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals, dated April 26, 1979, is reported at 599 F. 2d 151 (7th Cir. 1979), and is reproduced in the appendix to the Petition for Certiorari filed by the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee[1] (hereafter Appendix). That Appendix also contains an unpublished order, entered by the Court of Appeals on April 26, 1979, which contains the Court's factual discussion of the evidence. (Appendix B-1 *et seq.*) See Court's published opinion, 599 F. 2d 151; 167 n. 31 (Appendix A-27) Also enclosed in the Appendix is the order of the Appellate Court denying the plaintiff-appellees' petition for rehearing (Appendix p. C-1), the Judgment Order of the District Court, dated November 15, 1977 (Appendix p. D-1), and the District Court's Findings of Fact and Conclusions of Law, dated July 29, 1977. (Appendix p. F-1)

JURISDICTION.

The Seventh Circuit entered judgment on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. On September 12, 1979, Mr. Justice Stevens entered an Order granting an extension of time until October 5, 1979, for the filing of this petition for certiorari. This Court's jurisdiction is invoked under the provisions of 28 U. S. C. § 1254(1).

---

1. All three Milwaukee-area municipal defendants are hereafter collectively called Milwaukee.

STATEMENT OF ISSUES.

1. Where the District Court has found, and the appellate court has affirmed, that Milwaukee's discharges of raw and improperly treated sewage—containing billions of disease-causing viral and bacterial organisms—are transported into Illinois waters where such organisms can contaminate the water supply and infect swimmers, thus posing a "significant risk of injury to Illinois residents," and the appellate court had properly reviewed the evidentiary basis of the liability issue under the "clearly erroneous" standard of Rule 52(a) of Federal Rules of Civil Procedure, may the appellate court disregard the limitations of Rule 52 in reviewing the evidentiary basis of the remedial order entered by the District Court and order its own remedy on the basis of extra-record factual presumptions?

2. Where the District Court has found, and the appellate court has affirmed, the liability of Milwaukee for creating a public health nuisance in Illinois waters, and the appellate court finds that the evidence in the record below as to remedy is uncertain with regard to the degree of treatment required to destroy disease-causing organisms, is the appellate court free to fashion its own remedy on the basis of extra-record presumptions, or should it remand to the District Court for the taking of additional evidence to resolve those areas of uncertainty regarding the remedy?

3. Was the appellate court correct in disregarding the claims made by the State of Illinois under Illinois law, both under the state common law of nuisance and under the Illinois Environmental Protection Act?

STATUTES AND RULES INVOLVED.

1. Rule 52(a) of the Federal Rules of Civil Procedure, which provides in pertinent part as follows:

   Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given of the opportunity of the trial court to judge of the credibility of the witnesses. . . .

2. The following sections of the Clean Water Act:

   a. Section 101(a), which provides in part as follows:

      (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

         (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

         (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983, . . .

   b. Section 301, which provides in part as follows:

      (b) In order to carry out the objective of this Act there shall be achieved—

      * * * * *

         (1)(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

         (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet

water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by section 510), or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

c. Section 302, which provides as follows:

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be ob-

tained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

d. Section 303, which provides in part as follows:

(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

e. Section 505(e), which provides as follows:

Nothing in this section shall retrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

f. Section 510, which provides as follows:

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any

State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

3. The following sections of the Illinois Environmental Protection Act:

   a. Section 3(n), which provides as follows:

      "Water pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

   b. Section 12(a), which provides as follows:

      No person shall:

      (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

* * * * *

STATEMENT OF THE CASE.

A. Procedural History.

This case centers on the discharge by defendants of enormous volumes of raw and improperly treated human feces into Lake Michigan. Illinois originally brought this action as an original Bill of Complaint before the United States Supreme Court. However, in 1972 the Supreme Court held that Milwaukee was not a state for purposes of mandatory original jurisdiction by the Supreme Court over actions between the states under 28 U. S. C. § 1251(a)(1). The Supreme Court did hold however that Illinois could bring an original action against Milwaukee in the federal District Court under the doctrine of federal common law nuisance. *Illinois* v. *City of Milwaukee,* 406 U. S. 91 (1972).

In 1972 Illinois filed a complaint in federal District Court seeking to abate Milwaukee's fecal discharges. The complaint was in three counts. Count I charged Milwaukee with the creation of a federal common law nuisance. Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act. Ill. Rev. Stat. Ch. 111½ § 1001 *et seq.*[2]

---

2. Ill. Rev. Stat. Ch. 111½, § 1012 states in part:

"No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources,* or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;" (Emphasis added.)

Ill. Rev. Stat. Ch. 111½, § 1003(n), defines "water pollution" as:

"[S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such

(Footnote continued on next page.)

Count III charged Milwaukee with the creation of a common law nuisance under Illinois law pursuant to the remedy articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971).

The operative factual allegations were the same for all three counts. The complaint alleged that Milwaukee's discharges of both untreated and improperly treated sewage degrade the quality of Illinois waters of Lake Michigan as a source of drinking water, body contact recreation, sailing, fishing and other uses of the Lake. Subsequent to the filing of the Illinois complaint, the State of Michigan intervened as a plaintiff.

The case came to trial in January 1977. After hearing months of testimony and reviewing hundreds of exhibits, the District Court entered judgment finding that defendants' discharges constituted:

(a) a federal common law nuisance;

(b) a common law nuisance under Illinois state law;

(c) a violation of the Illinois Environmental Protection Act which prohibits any acts which may cause water pollution in Illinois. (Appendix F-2, F-24.)

B. Bases of Liability.

The basis of liability was two-fold. The first basis of liability was grounded on the enormous health hazard created by Milwaukee's discharges of raw and partially treated sewage into Lake Michigan. The District Court found that:

(Footnote continued from preceding page.)

> discharge of any contaminant into any waters of the State, *as will or is likely to create a nuisance* or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life."

1. Milwaukee discharges enormous quantities of viral and bacterial pathogens[3] in its raw and partially treated sewage into Lake Michigan. (Appendix F-6)

2. These disease-causing organisms are periodically transported southward into Illinois waters by shore parallel currents, thus exposing Illinois beaches and water supply intakes to these disease hazards. (Appendix F-6 to F-8)

The second basis of liability rested on the problem of "eutrophication" or accelerated aging of Lake Michigan. The enormous quantities of human feces discharged by defendants contain large amounts of phosphorus and other nutrients which are accelerating the aging of Lake Michigan. These nutrient discharges —in combination with other nutrient sources—are creating and stimulating the growth of obnoxious organisms which cause taste and odor problems in drinking water and unpleasant bathing conditions and create conditions hostile to aquatic life.[4] (Appendix F-16 to F-20)

C. The Remedy to Destroy Disease-Causing Organisms.

Having found liability, the District Court entered a judgment order designed to abate the disease nuisance. The District Court's remedy with respect to the elimination of disease-causing organisms was in two parts:

1. Collection.

The District Court ordered that all of the raw sewage be collected for treatment instead of being discharged into Lake

3. One single gram of feces from an infected viral disease carrier can contain literally millions of viruses. (Tr. 10278) These viruses contain such diseases as polio, pleurodynia, myocarditis, meningitis, and encephalitis. (Tr. 2163-2170)

4. The court's finding of eutrophication liability is not at issue in this petition, nor is the remedy ordered to abate eutrophication the subject of the petition. The District Court ordered *less than* 1 mg/l phosphorus which would be "the inevitable consequence of the type of advanced treatment which is being ordered" to prevent discharge of disease-bearing organisms. (Appendix F-26)

Michigan. The court did not order a particular method of collection but required the parties to draft an order selecting a method for collection. (Appendix F-26) The parties selected a method of collection that called for a conveyance storage and treatment system and submitted this system as part of a stipulated judgment order. (See p. 16, n. 8, *infra*)

2. Treatment to Destroy Pathogens.

The District Court then ordered that all of the raw sewage—once collected—be given a level of treatment sufficient to destroy the disease-causing organisms in the sewage prior to discharge.

The logic of the District Court's order on the destruction of disease-causing organisms is simple.

a. At Milwaukee's existing sewage treatment plants, chlorine is used as a disinfectant to destroy virus and bacteria.

b. However, chlorine is only reliable and effective as a pathogen-destroying agent in its "free"-chlorine form, *i.e.* as hypochlorous acid. When organic material in the sewage (measured by a term called Biochemical Oxygen Demand) comes into contact with free chlorine, the resultant compound is called "combined chlorine" which is at best a much slower acting disinfectant and often has no pathogen killing capability. (Tr. 12065 to 67) The unanimous recommendation of plaintiffs' experts was that organic material be removed to as low levels as possible to minimize the formation of "combined chlorine" and to allow "free" chlorine (hypochlorous acid) to disinfect the sewage. (Tr. 12068) They recommended that the organic content be reduced to 5 mg/l BOD. (Tr. 3206)

c. Even where organic material is removed to allow the presence of free chlorine, fecal-solids material can encapsulate the disease-causing organisms (pathogens) and prevent the chlorine from reaching the pathogens. It was the unanimous recommendation of plaintiffs' experts that solids

> should be removed from the sewage as far as possible to allow the free chlorine to reach the pathogens. (Tr. 12068) Plaintiffs' experts recommended a solids effluent level of less than 5 mg/l. (Tr. 3091, 12402)

The recommendations and testimony of plaintiffs' witnesses[5] were corroborated by the defendants' own evidence. Defendants' only witness on the question of viral destruction was Doctor Otis Sproul. Dr. Sproul made the following admissions pertinent to the disinfection remedy:

> Chlorine is an effective viricide in water under proper conditions. For best results, chlorine should be present as hypochlorous acid, and *no suspended solids or turbidity should be present.*

Sproul, "Removal of Viruses by Treatment Processes" in Berg, et al. (ed.), *Viruses in Water,* 167 at 173. (Defendants' Exhibit 229, emphasis added)

> These data indicate that for the viruses shown in the table, *free* chlorine residuals of 1 to 2 mg/1 with contact times of 1 to 2 hr. would be required for extensive inactivation in waters with pH values of about 7.8. *Id.* p. 174. (Emphasis added.)
>
> Most disinfection standards for wastewater treatment plants can be met with combined chlorine residuals; *under these standards it is obvious that little virus inactivation is obtained. Id.* p. 175. (Emphasis added.)

The trial court obviously relied on this and other testimony when it found:

> *I am satisfied from the testimony of Dr. Wellings and other witnesses in the case that unless there is a good removal of solids and a free chlorine residual, there is not an adequate*

---

5. Plaintiffs' witnesses included, among others, one of the United States EPA's top experts on virus and virus destruction, Dr. Gerald Berg, and one of EPA's top experts on bacteriology and bacterial destruction, Mr. Edwin Geldrich. Another key witness for plaintiffs was Dr. Flora Mae Wellings of the Florida Department of Health and Rehabilitation Services. Dr. Wellings has done exhaustive studies of viral destruction and was recognized by defendants as a leading expert long before trial.

> *kill of viruses.* There is evidence in the record on both sides of the case which I find convincing on that point. The defendants never have a free chlorine residual by the amperometric test, which I find from the evidence is the more *valid of the two methods of measuring a chlorine residual.* (Appendix F-11.) (Emphasis added.)

The trial court also found that the level of organics and solids involved with the so-called "30-30" effluent limitation urged by defendants would not provide adequate disinfection. There were several reasons for this finding:

1. Even where defendants' plants currently met the 30/30 standard, defendants were never able to achieve a "free" chlorine residual—essential to the destruction of pathogens.

2. Dr. Wellings testified that 30 mg/1 of solids and 30 mg/1 organics (BOD) would tie up the chlorine; and both Dr. Wellings and Mr. Geldreich recommended levels of 5 mg/1 for both solids and BOD. (Tr. 3206, 12402)

3. Even if the District Court had accepted the removal efficiencies claimed by defendants for an effluent with 30 mg/1 BOD and 30 mg/1 solids, *billions* of viruses per day would still be discharged by defendants. (Tr. 12098) The defendants' expert had testified that, when operating at maximum efficiency, a "secondary" activated sludge treatment plant, achieving a 30/30 effluent with chlorination, could achieve an effluent containing 7 infectious viral units per liter of waste waters.[6] (Tr. 10470, 10487) Accepting arguendo defendants' unsupported claim that secondary "30/30" effluent, with chlorination, could achieve an effluent of 7 infectious viral units per liter, Dr. Berg of the EPA pointed out that, even at a few infectious units per liter (a liter is approximately equivalent to a quart), defendants' plants would discharge *billions* of infectious units per day. (Tr. 12097, 12098)

---

6. Plaintiffs' witnesses hotly disputed Sproul's estimates. Sproul had never tested any sewage plants. Dr. Berg testified that secondary plants often achieved from 0-50% virus removal, not the 99% claimed by Sproul.

Thus the trial court's finding that:

> "Even if a 30/30 standard were met, it is my finding that that standard would still result in staggering numbers of pathogens to Lake Michigan." (Appendix F-6.)

On the basis of this evidence that the District Court entered its order that the effluent be treated to a level where solids and organics would be reduced to 5 mg/1 solids and 5 mg/1 BOD with a free chlorine residual. (Appendix F-26, F-11)

After the court announced its findings, the parties were given time to work on an agreed judgment order which reflected the trial judge's findings. On November 14, 1977, rather than have the District Court hear extensive evidence on the details of the remedy to be contained in the judgment order, the parties submitted a stipulation and proposed judgment order.

> The parties agree to be precluded from asserting on appeal any challenge to the engineering feasibility (or to the engineering feasibility of the time schedules for installation) of the transport, collection and treatment facilities and the engineering feasibility of accomplishing the effluent standards set forth in the attached form of Judgment Order. (Appendix E-2.)

It was this agreed judgment order which was jointly prepared by the defendants and the plaintiffs, which the District Court entered on November 15, 1977. Thus the method of collection and the timetables for completion were agreed to by defendants.

D. The Action of the Court of Appeals.

The Court of Appeals followed what can at best be described as divergent paths. On the question of liability the Court of Appeals followed the "clearly erroneous" requirement of Rule 52(a) of the Federal Rules of Civil Procedure.

> The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where they may infect drinking

> water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. (Appendix A-26, A-27.)
>
> . . .
>
> The district court found that "bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters." [Tr. 14217.] This finding is not clearly erroneous. (Appendix B-10.)

Indeed in a detailed analysis of the evidence underlying liability, the Court of Appeals affirmed on every evidentiary point raised by defendants. (Appendix B-2 to B-25)

Turning to the remedy, the Court of Appeals affirmed the District Court on the requirement that raw sewage be collected and sent to the treatment works rather than discharged in its raw state into public waters. Noting the prohibition of sewage discharges without meeting the discharge limitations of 301(b)(1)(B)[7] of the Clean Water Act, 33 U. S. C. § 1311(b)(1)(B), the court acknowledged the folly of allowing raw sewage discharges to the same system.

> It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301(b)(1)(B), if raw sewage can nonetheless be discharged at will from overflow points before it reaches the treatment works. (Appendix A-32, A-33.)

The Court of Appeals observed that both defendants' Director of Engineering and defendants' sanitary engineering consultant had agreed that the continued discharge of raw sewage was not acceptable as an alternative to collection and treatment. (Appendix A-34 to A-35) The Court of Appeals held:

> It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take

---

7. The Court of Appeals ignored the more stringent limitations which may be imposed under 301(b)(1)(C). See discussion *infra*.

> time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. (Appendix A-34)

The court observed that defendants had conceded that the time limits set forth in the judgment order was feasible. (Appendix A-38).[8]

E. The Effluent Limitation.

Having affirmed on the question of liability and having affirmed on that part of the remedy that ordered collection of the raw sewage, the Court of Appeals suddenly switched to a different method of analysis to deal with the effluent limitations of 5 mg/l solids, 5 mg/l BOD and a free chlorine residual ordered by the District Court. The appellate court rejected the District Court's effluent limitations.

The Court gave two reasons for its decision.

First, the court could not find sufficient evidence in the record to determine whether the nationally mandated federal minimum effluent limitation of 30 mg/l suspended solids and 30 mg/l BOD on a monthly average was adequate or inadequate with regard to effective destruction of viral and bacterial pathogens.

> The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a [*sic*] 5 mg/l suspended solids and BOD_5 than at 30 mg/l suspended solids and BOD_5; *the difference may be significant or it may be de minimus.* (Appendix A-43; emphasis added.)

---

8. Indeed the time limitations in the order were negotiated by defendants and, if anything, are very liberal. For overflows outside the Combined Sewer Area, the defendants had almost 9 years (November 15, 1977, to July 1, 1986) to correct these overflows. For overflows in the Combined Sewer Area, the defendants have over 12 years (November 15, 1977, to December 31, 1989) to achieve these goals.

Rather than remand to the District Court for the taking of evidence to determine whether this difference is significant or *de minimus*, the Court adopted the 30 mg/l limitation on solids and BOD. Moreover, as to the free chlorine limitation, the Appellate Court followed the same tack.

> *It is not clear whether the fecal coliform*[9] *limitation and the free chlorine residual requirement imposed by the district court can be met with secondary treatment.* In any event, the record support for these limitations is as deficient as it is for the suspended solid and BOD_5 limitations, and we are provided with no explanation of why such limitations were not included in the NPDES permits for the plants and the federal regulations. (Appendix A-46; emphasis added.)

As discussed above, the District Court had more than ample evidence of the fact that a 30/30 effluent could not adequately destroy virus. In two years of records of plant operations, the defendants' plants had virtually never achieved a free chlorine residual even when operating at 30/30. Moreover, even accepting defendants' testimony as to secondary plant efficiency, billions of viruses would be discharged daily.

Instead of remanding for the taking of evidence in these areas where the Court of Appeals felt uncertain, the court engaged in a totally unfounded extra-record presumption. Without a shred of record evidence, the court presumed that the 30/30

---

9. The fecal coliform number in the judgment order was a number negotiated by the parties in preparing the judgment order. Plaintiffs had contended in negotiations that a free chlorine residual should produce a zero fecal coliform bacteria. Defendants asked that the same number that had been negotiated in the other cases—namely 40—be set forth. As such a negotiated number, it necessarily has no basis in the record. What is clear in the record is that the District Court did not want any games played with "geometric" averages. (Appendix F-26, see pp. 25-26 *infra.*)

In another unusual action, the Court of Appeals apparently rejected the District Court's finding of liability and imposition of remedy based on state statutory and state common law grounds. (Appendix A-46, n. 53) Thus the Court of Appeals never discussed the factual or legal basis of the remedy ordered by the District Court on these grounds. See discussion *infra* pp. 26-28.

effluent limitation, with no chlorine residual requirement, was based upon a detailed consideration by federal and state officials that a "30/30" effluent limitation was capable of achieving effective pathogen destruction.

> The record is conspicuously silent as to the reasons these less stringent standards were *found adequate* to protect persons in the immediate environs of the discharges *by experts who were presumably as dedicated to the protection of public health* and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here . . . . (Appendix A-45; emphasis added.)

This extra record assumption that some experts somewhere had considered viral destruction in setting the 30/30 effluent limit simply has no basis in the facts of this record. Indeed, the uncontroverted evidence is that even the removal claimed by defendants would release billions of viruses daily. See discussion *infra* at 21-22.

REASONS FOR GRANTING THE WRIT.

I.

IN OVERTURNING THE DISTRICT COURT'S REMEDY AND SUBSTITUTING ITS OWN REMEDY BASED ON EXTRA-RECORD FACTUAL ASSUMPTIONS, THE COURT OF APPEALS USURPED THE BASIC FACT-FINDING FUNCTION OF THE DISTRICT COURT.

An appellate court cannot fashion its own remedial order—especially in a critical area involving public health—on the basis of extra-record factual asumptions.

A. The Application of the Clearly Erroneous Standard.

Preliminarily, the appellate court failed to examine the factual evidentiary basis of the District Court's effluent limitations order under the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure. While the appellate court recognized its limited review role under Rule 52 in examining the findings of fact upon which the District Court based its decision on liability, the appellate court ignored this criterion in examining the factual basis of the District Court's effluent limits.

As this Court has pointed out, the appellate court's role with regard to review of factual findings by the district courts is limited:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not

> whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine,* 395 U. S. 100, 123 (1969).

This deference to the district court's factual findings is particularly true where, as here, much of the evidence regarding remedy was based on witness testimony.

Viewing the evidentiary bases of the District Court's effluent limitations under the clearly erroneous standard, there is no basis for the Appellate Court's action. As explained above, the logic of the District Court's order was as follows:

> 1. In order to chlorine to destroy viral and bacterial pathogens, the chlorine must be in a "free" state, *i.e.* as hypochlorous acid. Organic material—which is often tested as Biochemical Oxygen Demand (BOD)—combines with free chlorine to form "combined" chlorine having little or no disinfection capabilities. Consequently, in order to insure complete destruction of pathogenic organisms, especially virus, it is necessary to have free chlorine rather than "combined" chlorine. To achieve this free chlorine it is necessary to keep organic material (BOD) as low as possible. A level of 5 mg/l of BOD was recommended by plaintiffs' experts.
>
> 2. Even with free chlorine present, the fecal solids in the effluent shield or encapsulate viral and bacterial pathogens from the action of free chlorine. Consequently, it is necessary to reduce the solids in the effluent to as low a level as possible. Plaintiffs' experts recommended a solids level of 5 mg/l suspended solids.

The District Court had ample evidence that the 30/30 standard with no chlorine residual, which was urged by defendants, would not effectively destroy pathogens:

> 1. Testimony by Dr. Berg, an EPA virologist, and an examination of defendants' plants' operating records showed

that defendants virtually never achieved a free chlorine residual measured by the more accurate orthotolodine method. This failure to achieve a free chlorine residual occurred even when the defendants' plants operated within the 30 BOD/30 solids limits.

2. Testimony by Dr. Berg and Dr. Wellings demonstrated that biological activated sludge secondary plants, such as defendants', were characterized by highly variable performance in virus removal, often achieving removal efficiencies of only zero to 50%. (Tr. 12148)[10]

3. Even if the trial court had accepted the testimony of defendants' witness on the viral removal capability of a secondary plant meeting 30/30, the evidence supported rejection of the 30/30 standard for viral destruction. The defendants' sole witness on viral destruction by sewage plants was Dr. Sproul. Even though he had never tested sewage plant effluent for virus in his entire career, Dr. Sproul hypothesized that a secondary biological plant with combined chlorine could achieve 99% removal. Basing his estimate on an incoming concentration of 7,000 infectious units per liter (approximately one quart), Dr. Sproul testified that a well-run secondary plant could achieve an effluent of 7 infectious units per liter. (Tr. 10470, 10487)

The number of infectious units in a quart is irrelevant in light of the size of defendants' operations and the virulence of virus. First, Sproul acknowledged that as small a dosage as one infectious viral unit may be enough to cause disease. (Plaintiffs' Exhibit 236) Second, even accepting a figure of 7 infectious units per liter, that represents a discharge by defendants of

10. It must be emphasized that the 30/30 limits set by the appellate court are monthly *averages* which can allow BOD or solids to go above 100 mg/l on any given day and still meet the average. Such averaging ignores slugs or bad days of contamination and was severely criticized by plaintiffs' private and governmental experts and brings to mind the well-worn anecdote about the man who drowned in a river with an "average" depth of 3 feet.

approximately a *billion* infectious viral units per day. As Dr. Berg testified, the discharge of billions of infectious viral units in a single day is unacceptable. (Tr. 12100) And as the District Court found:

> . . . [E]ven if a 30/30 standard were met, it is my finding that that standard would result in the discharge of staggering numbers of pathogens into Lake Michigan. (Appendix F-6)

The trial court also had ample evidence that a 5 mg/1 standard and free chlorine would destroy virus. Not only did Dr. Wellings recommend 5 mg/1 for virus destruction, but Wellings had also specifically tested facilities designed for 5 mg/1 for viral removal. Dr. Wellings testified that facilities designed to meet the 5 mg/1 standard, i.e. a biological plant followed by sand filtration, were able to completely destroy virus. (Tr. 12399)

Thus, the District Court had more than ample evidence to support the evidentiary findings on effluent limits that:

(a) A free chlorine residual is necessary for effective disinfection, i.e. destruction of disease-causing organisms.

(b) Organic material (BOD) interferes with free chlorine effectiveness by binding with the chlorine to form weak and ineffective disinfectant.

(c) When operated at 30/30 defendants' plants could not achieve a consistent free chlorine residual when measured by the orthotolodine method.

(d) Even accepting defendants' estimates of 30/30 effectiveness in viral destruction, defendants' plants would still discharge billions of viruses per day.

(e) Plants operating under an effluent limitation of 5 mg/1 can and have achieved complete destruction of virus.

This evidentiary base, when viewed in light of the deference to be paid to District Court findings under the "clearly er-

roneous" standard of Rule 52, demonstrates the appellate court's error in overturning these findings and the order on which they were based.

B. The Appellate Court's Failure to Remand.

Had the Court of Appeals applied the "clearly erroneous" standard, the District Court's order should have been sustained. However, the Court of Appeals appears to have been troubled by what it perceived to be a lack of evidence regarding the differing degrees of viral removal at solids at BOD concentrations between 5 mg/l and 30 mg/1.

> The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a [*sic*] 5 mg/1 suspended solids and BOD_5 than at 30 mg/1 suspended solids and BOD_5; the difference may be significant or it may be *de minimis.* [footnote omitted.] (Appendix A-43.)

On the contrary—as discussed above—even defendants' most favorable estimate for 30/30 would result in billions of infectious viral units being discharged each day. In contrast, at 5 mg/l no viral units would be discharged.

The Court of Appeals also seemed to find a need for evidence of viral destruction efficiency at levels of solids and BOD between 5 mg/l and 30 mg/l:

> While Wellings, who comes the closest to providing evidentiary support for the suspended solids limitations the court imposed, testified that "the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into," and there would "still" be "a problem with disinfection," she did not say the same would be true of *any figure between thirty and five.* (Appendix A-44 n. 50.) (Emphasis added)

Preliminarily, having proved that a 30/30 effluent would still contain billions of viruses per day and that 5 mg/l suspended solids and BOD would not, petitioner finds it hard to believe that the successful plaintiff—having proved contamination and the level of protection sufficient to eliminate that contamination —must bear the burden of proof as to the efficacy or lack thereof of every intermediate level of treatment. Other than its defense of 30/30, Milwaukee never tendered to the District Court, the Court of Appeals, or the plaintiffs any intermediate effluent number which would purport to permit destruction of virus. Moreover, should defendants discover and wish to tender such evidence, the Judgment Order expressly provides a modification procedure to be based on an evidentiary record made in the District Court.

Given these facts there was no basis for the Court of Appeals' decision to tamper with the District Court's order. But even if the Court of Appeals had legitimate evidentiary questions, the appellate court cannot reach evidentiary conclusions on the basis of evidence not in the record. Accepting *arguendo* the merits of the Court of Appeals' concerns, the appropriate resolution of these factual doubts lay in a remand to the District Court for the taking of additional evidence to resolve the specific questions raised by the Court of Appeals. *See De Marco* v. *United States,* 415 U. S. 449, 450 (1974); *Cf. Cordova* v. *Fox,* 351 F. 2d 269, 271 (10th Cir. 1965).

Instead of remanding for the taking of additional evidence to provide a factual record for its questions, the Court of Appeals took the startling action of adopting the 30/30 standard with no chlorine residual effluent limits as adequate to destroy viral pathogens. As noted above, the evidence and the District Court's finding were unequivocal that a 30/30 standard—even when viewed in the light most favorable to defendants—would still allow billions of infectious viral units to be discharged each day.

But the appellate court chose to ignore this record evidence and instead to rely on an unusual extra-record presumption that

is totally without foundation and is factually incorrect. The appellate court assumed without any record evidence that the 30/30 effluent limitation imposed on Milwaukee's discharges by administrative agencies was based upon a detailed consideration by federal and state officials that a 30/30 effluent limitation was capable of permitting effective destruction of pathogens.

> The record is conspicuously silent as to the reasons these less stringent standards *were found adequate* to protect persons in the immediate environs of the discharges *by experts who were presumably as dedicated to the protection of public health* and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here . . . . (Appendix A-45; emphasis added.)

Nowhere in the record is there any evidence that EPA or the State of Wisconsin has found these "less stringent standards" adequate to destroy virus. Indeed, in the trial below one of EPA's top experts testified that secondary biological plants—which form the basis for EPA's definition of 30/30, 40 C. F. R. Part 133—have very poor performance on viral removal. (Tr. 12247) Even accepting defendants' best estimate of viral removal at 30/30 the defendants' plant would still discharge billions of viral units per day.

In five years of trial preparation and over four months of trial, defendants never brought forward a single EPA or State of Wisconsin official to testify that 30/30 was adequate to destroy virus. Indeed, there is not one bit of record evidence that the federal and state officials even considered viral destruction in setting the 30/30 standard.[11]

---

11. There was consideration of bacterial pathogen destruction. The 200 fecal coliform per 100 ml. monthly average is a "geometric mean." This limit was first established by EPA as part of the definition of "secondary treatment." 40 C. F. R. Part 133, 38 Fed. Reg. 22298 (August 17, 1973). However, at trial below, Edwin Geldreich, an EPA expert on bacterial pathogens who testified for plaintiffs, was critical of the "geometric mean" because it allowed slugs of bacterial contaminants on a given day. (Tr. 3211) What the appellate court did not realize, but what is specifically noted in

(Footnote continued on next page.)

For the appellate court to presume without any record evidence that viral destruction was considered by state and federal officials and that a finding was made that viral destruction was adequate at 30/30 is incredible. The evidence in the record is directly contrary and the appellate court's extra-record presumption should be disregarded. The appellate court should have affirmed the District Court under the clearly erroneous standard of Rule 52. At worst, any evidentiary doubts of the appellate court should have been remanded to the District Court for the taking of evidence on those specific issues.

II.

THE COURT OF APPEALS ERRONEOUSLY DISREGARDED THE PLAINTIFF'S REMEDIES UNDER STATE STATUTE AND COMMON LAW.

A. State Statutory and Common Law Claims Should Be Heard.

As noted above, this Complaint against the City of Milwaukee and its related municipal corporations was brought on three separate legal grounds:

1. federal common law nuisance;
2. state statutory liability for out-of-state dischargers causing pollution in Illinois waters; and
3. state common law nuisance.

The District Court found liability on all three counts (Appendix F-2, F-24) However, the Court of Appeals ignored plaintiffs'

(Footnote continued from preceding page.)

the record below, is that this 200 fecal coliform requirement is a "geometric" average. By using a process of logarithmic averaging called a "geometric" average, Milwaukee has had single day discharges as high as 230,000 fecal coliform per 100 ml. and still has met the monthly and weekly requirements of this "geometric" average. What is clear in the record is that the District Court did not want any games played with "geometric" averages. (Appendix F-26)

state law claims and held that it would only consider federal common law. (Appendix A-46 n.53)

By disregarding plaintiffs' claims under state law the Court of Appeals was able to insert a "common law of the statute" theory into its interpretation of federal common law. (Appendix A-20 to A-23) Using this common law of the statute theory the Court of Appeals used the secondary treatment requirements of § 301(b)(1)(B) of the Clean Water Act as the focal point of its inquiry.

As discussed below, the appellate court's "common law of the statute" approach ignored the fact that the secondary treatment requirements of § 301(b)(1)(B) were simply minimum treatment requirements based on minimal technology. Totally ignored by the Court of Appeals' analysis is the entire water quality framework of § 101(b), the goal of "fishable, swimmable" waters and the detailed mechanisms of § 303 and § 302 of the Act for establishing tougher water quality related effluent limitations for sewage plants. *See*, § 301(b)(1)(C).

Putting the "common law of statute" gloss on federal common law to one side, there is no basis for assuming that the federal statute or the federal common law of nuisance did away with rights and remedies created by state law. Indeed, the federal statute is very clear on this point. Section 510 of the Clean Water Act states:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt *or enforce* (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance

> which is *less stringent* than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 33 U.S.C. § 1370 (emphasis added.)

Moreover, § 505(e) of the Act expressly preserves common law remedies:

> Nothing in this section shall restrict any right which any person (or class of persons) may have *under any statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief*. . . . 33 U.S.C. § 1365(e). (Emphasis added.)

Thus, it is clear that the state common law nuisance remedy using the state long-arm statute for *in personam* jurisdiction retains its vitality under the federal statute. *See Ohio* v. *Wyandotte Chemicals Corp.*, 410 U. S. 493, 496 n. 2 (1971); *Committee for Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1009, text and n. 9 (4th Cir. 1976). The State of Illinois has used these state common law nuisance tools with great effectiveness in requiring more stringent levels of effluent control by out-of-state dischargers into Lake Michigan than those imposed by EPA or by local authorities.

Thus, whatever the appellate court considered as the limitation of the "common law of the statute" as it related to the federal common law, these so-called limitations do not bind state common law relief. *Committee for Jones Falls, supra.* The appellate court should have examined the evidence supporting liability and remedy under the state law claims.

B. The Court of Appeals Misunderstood the Statutory Structure of the Clean Water Act.

In applying the federal common law of nuisance the appellate court placed great emphasis on its articulation of a "common law of the statute" theory. Thus, according to the appellate court,

under common law principles the court should look to the structure of the Act for guidance. (Appendix A-21)

However, in turning to the statute for guidance, the Court of Appeals totally ignored the logical structure and design of the Act. To the exclusion of everything else, the court focused on the "secondary" treatment requirements imposed on a publicly-owned treatment works under § 301(b)(1)(B) of the statute. (Appendix A-21 to A-22) What the Court of Appeals either ignored or did not understand is that the secondary treatment requirement is merely a technology-based, minimal level of treatment. Each discharge point must be given further analysis to determine water quality impacts and whether more stringent limitations are to be imposed to prevent violation of a water quality standard. Indeed, § 303 of the Act, in conjunction with § 301(b)(1)(C) of the Act, sets forth a detailed structure whereby much more stringent levels of effluent control are to be imposed to achieve and preserve water quality standard. These more stringent limitations are called "water quality related effluent limitations" and may be employed by the state in which the discharger is located under § 303 and by the EPA under § 302. This remedy is not available to other states such as petitioner.

The water quality effluent limitation process is relatively simple:

1. The beneficial use is designated. The water quality goal for all waters is set forth in § 101(a) of the Act. There is no question here that Lake Michigan is considered by all parties to deserve the highest use of swimming, fishing, and public water supply.

2. Numerical or narrative ambient water quality criteria are designated which are necessary to sustain the use.

3. An effluent limitation is put on the discharger which is sufficiently stringent to prevent a violation of the ambient water quality criteria.

The Court of Appeals ignored this entire water quality related effluent limitation scheme under the statute. Moreover, the appellate court fell into a major trap which polluters often use, but usually unsuccessfully. Milwaukee has managed to turn the focus away from its contamination of Lake Michigan into a court-sponsored squabble as to which agency has or has not protected the public health.

It does not do Lake Michigan or the petitioner State of Illinois any good to point extra-record, accusatory fingers at the State of Wisconsin and EPA. For reasons known best to themselves, they have not seen fit to undertake a water quality limited effluent analysis for viral pathogens under § 303 or § 302 of the Act.

If the statute is to provide guidance in a federal common law nuisance action Illinois suggests that the District Court's effluent limitations are just the kind of water quality related effluent limitations contemplated by §§ 301(b)(1)(C), 303 and 302 of the Act and are thus consistent with the common law of the statute. The District Court found:

> 1. that very low levels—perhaps as little as one infectious viral unit—could infect swimmers and create a hazard for water supply intakes;
>
> 2. that even accepting defendants' representation of viral removal at 30/30 such discharges would result in the discharge of billions of additional infectious viral units per day;
>
> 3. that to destroy virus and to prevent the discharge of virus to the environment, a free chlorine residual was needed and that the filtration of effluent to 5 mg/1 BOD, 5 mg/1 suspended solids destroyed the virus.

If "common law of the statute" is a proper legal theory for analyzing the elements of federal common law nuisance then the district court certainly patterned its analysis after the water quality concerns of the Clean Water Act.

CONCLUSION.

Lake Michigan is a precious body of clean, fresh, clear water in which the people of the State of Illinois have a vital stake. The evidence adduced in the trial below demonstrated unequivocally that Milwaukee has used Lake Michigan as a cesspool. Neither the citizens of Illinois nor the citizens of any other state should have to swim or draw their public water supplies from water contaminated with virus and bacteria.

The District Court, after exhaustive and patient scrutiny of four months of testimony, entered extensive findings setting forth the need for the effluent limitations contained in its judgment order. For the Court of Appeals to ignore the "clearly erroneous" mandate of Rule 52, F. R. C. P. in reviewing the evidence supporting the District Court's remedial order is egregious in itself. But for the appellate court to indulge in unfounded extra-record presumptions that unseen and unspoken "experts" who never testified and who never were cross-examined must have concluded that secondary treatment was sufficient to destroy viruses is preposterous.

Sound principles of judicial administration dictate that facts be determined by the District Court based on evidence properly introduced. Appellate court assumptions of extra-record facts lends itself to potential chaos and strong concerns about due process of law.

If simple property rights were at stake, this court might view these issues as significant to protect and promote sound allocation of judicial functions between trial and appellate courts. But much more is at stake here. The health of the people of the State of Illinois—their right to be protected from the disease hazards created by defendants—cannot be casually disregarded

by an erroneous extra-record factual assumption of the appellate court.

Petitioners respectfully submit that a Writ should be granted.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL, LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

October 5, 1979.

Supreme Court, U. S.
FILED
NOV 5 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

Brief of the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee in Opposition to the Petition For A Writ of Certiorari

RICHARD W. CUTLER
ELWIN J. ZARWELL
SAMUEL J. RECHT
ANDREW M. BARNES
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000
Attorneys for Petitioners the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee

JAMES B. BRENNAN
Room 800, City Hall
Milwaukee, Wisconsin 53202
(414) 278-2601
Attorney for Petitioner City of Milwaukee

Of Counsel:
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

and

MICHAEL J. McCABE
735 North Water Street
Milwaukee, Wisconsin 53202

November 2, 1979

INDEX

	Page
Question Presented	1
Statement of the Case	1
Reasons Why That Portion Of The Judgment And Opinion Of The Court Of Appeals Which Reverses The District Court Should Not Be Reviewed By This Court	2
A. The Determination Of The Court Of Appeals Which Illinois Seeks To Have Reviewed Is Purely And Simply A Determination That The Evidence Presented Did Not Sustain The District Court's Order	2
B. Illinois Really Seeks To Try Again After Failing In Its Proof	9
C. Federal Law, Not State Law, Applies To This Case	10
Conclusion	12

CITATIONS

Page

CASES:

Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) 11

Cordova v. Fox, 351 F.2d 269 (10th Cir. 1965) 9

DeMarco v. United States, 415 U.S. 449 (1974) 9

Illinois v. Milwaukee, 406 U.S. 91 (1972) 10,11

Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) 9

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 11

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) 10

MISCELLANEOUS:

Ill. EPA, *Petition for Amendments to the Water Pollution Control Regulations of the Illinois Pollution Control Board*, Illinois Pollution Control Board Docket R77-12 (May 10, 1977) 6

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

Brief of the City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee in Opposition to the Petition For A Writ of Certiorari

QUESTION PRESENTED

Should this Court grant certiorari with respect to that portion of the Court of Appeals' decision which determined that the evidence presented by the petitioners did not sustain certain relief provisions of the District Court's Judgment Order?

STATEMENT OF THE CASE

This Court is of course aware that the respondents herein have themselves petitioned this Court for a Writ of Certiorari

with respect to certain portions of the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit in this proceeding. *See* Case No. 79-408. Thus, the respondents do not maintain that the granting of a petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit would be inappropriate. However, the respondents do maintain that the criteria by which this Court determines whether to grant or not to grant a petition for certiorari require denial with respect to that portion of the Judgment and Opinion of the Court of Appeals to which Illinois' petition for Writ of Certiorari relates. As this responsive brief will show, the portion of the Court of Appeals Opinion and Judgment which Illinois seeks to have reviewed relates purely and simply to a determination by that court that Illinois had failed to meet the burden of proof imposed upon it by law in respect thereof and that the evidence in the record did not sustain that part of the District Court's Order. None of the criteria set forth in Rule 19 of this Court's Rules for granting the writ are present on the matters complained of by Illinois.

REASONS WHY THAT PORTION OF THE JUDGMENT AND OPINION OF THE COURT OF APPEALS WHICH REVERSES THE DISTRICT COURT SHOULD NOT BE REVIEWED BY THIS COURT

A. The Determination Of The Court Of Appeals Which Illinois Seeks To Have Reviewed Is Purely And Simply A Determination That The Evidence Presented Did Not Sustain The District Court's Order.

The trial in this action spanned six months and produced 14,000 pages of transcript and hundreds of exhibits. More than 400 pages of briefs and memoranda directed to the precise delineation of evidence relied upon were filed in the Court of Appeals. That court considered the matter for more than seven months prior to its decision of April 26, 1979. The result was a determination by the Court of Appeals that:

> "We are unable to conclude, after a careful examination of the evidence *cited by plaintiffs* to justify the limitations imposed, that this evidence was sufficient." App. A-42. (Emphasis added)[1]

The Illinois petition sets up a series of "straw men" and then knocks them down. One "straw man" is the claim that the Court of Appeals has acted on an erroneous extra-record presumption relating to the effluent limitations established by the EPA and the DNR. To knock it down Illinois presents an extensive argument directed *not to what the Court of Appeals determined* (that there was no evidence on the point) but rather to a presumption of the legitimacy of administrative conduct that the Court of Appeals noted, in passing, should be accorded to effluent limitations established by (a) the EPA, (b) the permit authority having the duty to protect residents in the immediate environs of the discharge, and (c) by the complaining state itself (App. A-45).

The Court of Appeals decision with respect to effluent limitations holds simply that Illinois had failed to meet the burden of proof imposed upon it by law. The court's decision is nothing more and nothing less than a judicial determination that the evidence submitted by Illinois in the court below failed to support the trial court's determination with respect to effluent limitations. True the court did say, as the fact is, that the state permit authority had "the duty of protecting residents in the immediate environs of the discharges" and that this was done "by experts who were presumably as dedicated to the protection of public health and the environment as those on whose conclusions plaintiffs rely." (App. A-45) But, the court's holding is that there was no evidence to sustain the effluent limitations imposed by the trial court. The court did not base its holding on the presumed dedication of the state officials.

---

[1] Appendix references herein are to the "Appendices to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" filed by respondents in Case No. 79-408.

A second fallacious position presented in the Illinois petition, which again is created by Illinois and not found in the decision of the Court of Appeals, is the assertion that the Court of Appeals adopted its own effluent limitations. That court did not adopt its own limitations. Having initially determined that the evidence in the record did not support the decision of the District Court with respect to effluent limitations, the Court of Appeals properly proceeded to reverse the determination of the District Court and direct that the judgment below be modifed to impose suspended solids, BOD_5, fecal coliform and free chlorine residual effluent limitations no more stringent than those *prescribed in defendant's discharge permits* issued in accordance with the Federal Water Pollution Control Act.

The Court of Appeals was very careful to make it clear that it was not adopting its own treatment requirements but rather simply deciding that the evidence in the record did not support the District Court's determination. It stated:

> "In short, plaintiffs point to nothing in the record, and we have found nothing to connect the effluent limitations imposed by the District Court with the protection of Illinois residents. If enforcement of the limitations imposed in the discharge permits proves inadequate to protect Illinois residents, then more stringent limitations may become necessary. But on the record before us, we cannot sustain the District Court's order in this respect." App. A-45.

The Court of Appeals decision is based upon a failure of proof, pure and simple. Illinois had a full and adequate opportunity to prove its case in the trial below. The court, after a full analysis of the record below, determined that it had failed to do so.

The Court of Appeals refusal to "cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions" (App. A-46) is based upon specific deficiencies denominated in its opinion (App. A-46 and

47). One of these deficiencies was that the effluent limitations sought to be imposed upon the defendants in this case were markedly lower than those established by the complaining state itself for waters other than Lake Michigan. On this point, the record shows that dischargers in Illinois are generally not affected by the Illinois limitations on discharges to Lake Michigan. The reason is that Illinois dischargers, such as Chicago, discharge (except for certain totally untreated by-passes which do go to Lake Michigan from Chicago and Waukegan on a relatively regular basis) under less severe limitations to other Illinois waters. Illinois never explained the reason for less stringent limitations upon discharges to its waters than those it seeks to impose on Milwaukee 25 to 40 miles away; it did not do so in any previous proceedings. This failure continues in the petition for writ of certiorari. Perhaps the most startling indication of Illinois' duplicitious approach in this case was the action of the Illinois Environmental Protection Agency. On May 10, 1977, during the course of the trial in this action, *without disclosure to the trial court by Illinois,* the Illinois Environmental Protection Agency petitioned the Illinois Pollution Control Board to amend certain water pollution regulations. That petition was accompanied by a statement of the "Justifications" of the Illinois Environmental Protection Agency supporting the petition for amendment. One of the proposed changes dealt with the question of the use of chlorine to disinfect effluents. The Illinois Environmental Protection Agency stated the following:

> "The Agency further proposes to modify the effluent standard for fecal coliform (Rule 405) to require disinfection of effluents only (1) upstream from beaches during the swimming season (May through September); (2) upstream from intakes for public or food processing water supplies (year-round); and (3) to locations where the discharge may cause or contribute to violations of another states' water quality standards in interstate waters (year-round).

> The Agency's proposals are based on its findings and its review of the relevant literature with respect to the need for disinfection of effluents and the cost and environmental impact of chlorination. The Agency will provide testimony at the hearings on this proposal in support of the following points:
>
> 1. Chlorine is not only toxic to aquatic life and a potential health hazard but may also be ineffective in reducing pathogenic organisms.
>
> 2. No technologically feasible and economically reasonable alternatives to chlorination for disinfection presently exist.
>
> 3. *Almost no documented occurrences of illness associated with ingestion of treated (but unchlorinated) sewage have been found by the Illinois Department of Public Health since records have been kept. Nor have such occurrences been reported in the literature.* The Department of Public Health supports the Agency proposal and has stated that it will testify in favor of it at hearing." Illinois EPA Petition for Amendments to the Water Pollution Control Regulations of the Illinois Pollution Control Board, Illinois Pollution Control Board Docket R77-12 (May 10, 1977). (emphasis added)

Another proposed change involved the deletion of the Illinois standard (applicable only to certain low flow by relation to volume of discharge conditions in Illinois waters) which imposes a 4 mg/1 BOD_5 and 5 mg/1 of total suspended solids' effluent limitation. That deletion will free *all* discharges to Illinois intrastate waters from the type of severe limitation sought to be imposed upon Milwaukee here. The justification of the Illinois Environmental Protection Agency for this proposed change is as follows:

> "The Agency proposes that the existing Rule 404(f) be deleted. The standard imposed by that Rule (4 mg/l BOD and 5 mg/l suspended solids) required a level of treatment well beyond the capabilities of conventional tertiary treatment. *Carbon adsorption appears to be the only possible means for compliance and results in extremely high capital and operating costs.*
>
> The Agency will submit evidence at hearing on this proposal to support the following points:
>
> 1. The *prohibitive cost of providing carbon adsorption* has not been reduced since the adoption of Rule 404(f) in 1972. Nor has any other economically reasonable process been developed that can produce effluent quality of 4 mg/l BOD and 5 mg/l suspended solids consistently within the averaging allowances of Rule 404(h)." Id. (emphasis added)

(The trial court here specifically determined that carbon adsorption would not be necessary to meet the 5/5 standard it imposed.) (Tr. pp. 13204-13205; App. F-26)

Thus, it is clear that the effluent standards sought to be imposed upon Milwaukee are not only more stringent than the effluent standards generally applicable in the State of Illinois, but also, during the very course of this trial, the Illinois Environmental Protection Agency proposed changes in the most stringent Illinois regulations applicable only to low flow ratios and based those proposed changes upon the very same principles which the respondents argued to the trial court and the Court of Appeals, *and Illinois did not disclose its real position at trial.*

Illinois' failure to adequately differentiate between the effluent limitations imposed on its own citizens and those sought to be imposed on the defendants unmasks the specious

character of its effluent limitation position in this case and should unmask it on this petition for writ of certiorari.

Illinois' attempt to characterize the claimed error of the Court of Appeals opinion as a failure to apply an appropriate standard of review is another example of a "straw man" argument. The determination by the Court of Appeals that there was a failure of proof does not involve a question on the standard of review.

The Court of Appeals decision recognizes the distinction between a failure of proof and proper deference to a trial court's discretionary determination which is supported by evidence in the record. When the court found that the evidence supported the District Court's determination with respect to overflows it stated:

> "The details of the relief to be granted are in large part left to the trial court's discretion...." App. A-39.

However, where the evidence to support a determination does not exist there is no office for a court's discretionary power to perform. Again, in the words of the Court of Appeals:

> "Nevertheless, a court, unlike a legislature or an administrative agency, is not free to rest solely upon what it thinks desirable; there must be evidence to support its conclusion that the relief granted is necessary to protect the complaining party from harm." App. A-42.

The full record was before the Court of Appeals. All of the evidence relied upon by Illinois was brought specifically to the attention of that court. That court reviewed all proffered evidence and found a void. In so doing, that court performed the classical duty of an appellate tribunal. A record void of evidence to support a lower court determination requires reversal. Reversal was accorded. No standard of review relating to the exercise of a trial court's discretionary power is applicable.

B. Illinois Really Seeks To Try Again After Failing In Its Proof.

Illinois' petition for a writ of certiorari boils down to a plea for another "kick at the cat." This same plea is applicable in every case where a failure of proof is determined on appeal. Every losing party can say, "Let me try again."

No part of the appeal process, including a petition for a writ of certiorari, should be the vehicle to secure a second kick at the cat, an opportunity to patch up a part of the record.

At page 24 of the petition, Illinois cites two cases for the proposition that a remand for the taking of additional evidence is appropriate. *DeMarco v. United States,* 415 U.S. 449 (1974) and *Cordova v. Fox,* 351 F.2d 269 (10th Cir. 1965). The cases cited by Illinois are inapplicable. Those cases deal with the situation where the trial court was never given the opportunity to make findings (*DeMarco*) or where the trial court failed to make findings of fact (*Cordova*).

In this case the District Court made the findings on effluent limitations. The Court of Appeals shouldered the burden of determining that there was no evidence in the record to support the effluent limitations imposed by the District Court, using the mechanism of ordering the parties to submit supplemental memoranda pointing to the evidence relied upon. Consequently, the situation here is that there has simply been a failure of proof after the Court of Appeals has addressed the record below in a searching inquiry. Thus the general rule that a court will not remand to permit new proofs where it would merely be giving the party an opportunity to reopen the case to make his proofs stronger, *Mefford v. Gardner,* 383 F.2d 748, 758 (6th Cir. 1967), becomes directly applicable.

C. Federal Law, Not State Law, Applies To This Case.

The trial court erred in deciding this case under state law, as well as federal common law. The Court of Appeals was correct in refusing to address the state law claims. In *Illinois v. Milwaukee*, 406 U.S. 91, 102 (1972), the Supreme Court stated:

> "[I]t is *federal*, not state, law that in the end controls the pollution of interstate or navigable waters." (emphasis added)

The Supreme Court quoted with approval from *Texas v. Pankey*, 441 F.2d 236, 241-242 (10th Cir. 1971):

> "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims...."[2]

---

[2] The Supreme Court pointed out:

> "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law [citations omitted.] Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n.6

Footnote continued on following page

While dictum appearing in a footnote to the decision in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971), might have been argued to support Illinois' claim that its laws can be applied to defendants, that argument is totally refuted by the holding of *Illinois v. Milwaukee*. There the Supreme Court expressly established as the law of this case that federal law must be the law applied and that *Wyandotte* has no office to perform here. (See 406 U.S. at 102 n.3)

(Footnote 2 continued)

See also, *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) where the court stated:

> "The law of the state whose citizens were subject to injuries by the interstate pollution ought not to govern the conduct of citizens and municipalities in another state, while to apply the law of the offending state would be a utilization of the laws of a state whose selfish interest was in the protection of the offenders, herself, her political subdivisions or her citizens. Of necessity, the Court of Appeals for the Tenth Circuit, in 1971, in *Pankey*, and the Supreme Court, in 1972, in *Illinois v. Milwaukee*, turned to a body of federal common law for the resolution of interstate pollution controversies when a state sought extra-territorial relief on behalf of her citizens."

CONCLUSION

The respondents respectfully pray that the Illinois' petition for a Writ of Certiorari be denied.

Respectfully submitted,

RICHARD W. CUTLER
ELWIN J. ZARWELL
SAMUEL J. RECHT
ANDREW M. BARNES
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000

Attorneys for Petitioners the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee

Of Counsel:
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

and

MICHAEL J. McCABE
735 North Water Street
Milwaukee, Wisconsin 53202

JAMES B. BRENNAN
Room 800, City Hall
Milwaukee, Wisconsin 53202
(414) 278-2601

Attorney for Petitioner City of Milwaukee

November 2, 1979

Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Respondents.

PETITIONER ILLINOIS' REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

November 13, 1979.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Reasons for Granting the Writ	1
I. The Court of Appeals' Imposition of a Level of Treatment Which That Court Presumed Was Sufficient to Destroy Virus Had No Basis in the Record	1
II. Illinois Does Not Seek to Relitigate Liability—That Issue Has Been Decided Against Milwaukee. Rather Illinois Seeks to Have the District Court's Remedy Upheld Under the "Clearly Erroneous" Rule or to Have the Effluent Limits Remedy Remanded to Test the Evidentiary Basis of the Remedy Ordered by the Court of Appeals	4
III. State Statutory and Common Law Remedies Co-Exist and Complement the Federal Scheme	5
Conclusion	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-571

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

PETITIONER ILLINOIS' REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS' IMPOSITION OF A LEVEL OF TREATMENT WHICH THAT COURT PRESUMED WAS SUFFICIENT TO DESTROY VIRUS HAD NO BASIS IN THE RECORD.

As set forth in Illinois' petition, there was ample evidence to support the effluent limitation imposed by the district court to destroy disease-causing virus in the sewage. (Illinois petition pp. 11-14, 20-23). Under a proper application of the clearly

erroneous standard of Rule 52, Fed. R. Civ. P., the district court's order should have been sustained. The Court of Appeals' failure to apply this standard to the evidence supporting the district court's remedy—while applying the proper "clearly erroneous" standard to the question of liability—is a major issue which should be resolved by this Court.

But even more critical an error was the Court of Appeals' adoption of an effluent limitation ("30/30") on the basis of the wholly unsupported presumption that EPA and the State of Wisconsin had studied the viral destruction efficacy of that limitation. Absolutely nowhere in the record is there a shred of evidence that EPA and Wisconsin had made any analyses of viral removal with 30/30 effluent or had even considered virus.

In contrast to the appellate court's extra-record presumption, the district court had ample evidence to support its finding that 30/30 with combined chlorine would not destroy virus. The district court made an explicit finding of fact:

> "The defendants attempt to conform their effluent to a standard of 30 parts per million of suspended solids and BOD, but they rarely achieve that standard and concede that before they can meet it with any consistency a substantial amount of additional plant renovation and updating will have to be done; but even if a 30/30 standard were met, it is my finding that that standard would still result in the discharge of staggering numbers of pathogens to Lake Michigan."
>
> Appendix F-6

The evidentiary basis of this finding came from the testimony of one of U. S. E. P. A.'s top experts on virus and public health, Dr. Gerald Berg, who testified for plaintiffs. Dr. Berg testified that his experience with full scale secondary biological sewage plants showed viral destruction of zero to fifty percent. But as Dr. Berg pointed out—even at the alleged 99% removal rate claimed by the defendants' virus expert—the resultant discharge by Milwaukee would be billions of infectious virus per day. (See discussion and references in Illinois' petition.)

For the Court of Appeals to blindly adopt a totally unsupported numerical limitation on the basis of *presumed* consideration by silent and absent agency officials is wholly impermissible —particularly where, as here, public health is at stake. Wisconsin officials—either independently or at Milwaukee's behest—never once communicated their purported concerns regarding virus removal to the district court in the five years this case was before the district court. EPA never submitted any evidence that a "30/30" effluent limitation was effective in destroying virus. Indeed, EPA supplied Illinois with EPA's top expert on virus—Dr. Berg—who testified that a secondary biological effluent (i.e. "30/30") was very ineffective in destroying virus.

Illinois believes that more than ample evidence existed to support the effluent limits imposed by the district court under a proper application of the "clearly erroneous" rule. However, if this Court believes that the question of the proper level of treatment to destroy virus needs further evidentiary development, then the proper course is to remand to the district court for such evidentiary proceedings. The Court of Appeals' action in unilaterally adopting the extra-record presumption that 30/30 would destroy virus was improper.

Indeed Milwaukee erroneously contends that "30/30" remains an immutable and universal requirement no matter what the condition and use of the receiving water. But as Illinois noted in its petition, even the Clean Water Act treats "30/30" secondary treatment as a baseline and allows more stringent water quality related effluent limitations to be imposed on discharges to high quality bodies of water such as Lake Michigan. 33 U. S. C. § 1313.

Thus it is not anomolous for the Illinois agency to recommend less restrictive standards[1] for a flowing river such as the

1. Contrary to the implication given by Milwaukee the district court below did not order Milwaukee to install carbon adsorption filters. Indeed the district court expressly excluded such treatment and ordered low cost sand filtration. Appendix D-5.

Illinois—which is not used for swimming or public water supplies—and a much more stringent limitation on dischargers to Lake Michigan—which is a very high quality swimming and public water supply resource. Moreover, even if the Illinois administrative agencies gratuitously issued effluent limits as lenient as Wisconsin's, that would not prevent the Illinois Attorney General from seeking a judicial order imposing more stringent limits on either interstate or intrastate polluters. Indeed the Illinois legislature has given express statutory recognition to this authority. *See, People ex rel. Scott* v. *United States Steel Corporation,* 40 Ill. App. 3d 607, 352 N. E. 2d 225, 228 (1976).

II.

ILLINOIS DOES NOT SEEK TO RELITIGATE LIABILITY—THAT ISSUE HAS BEEN DECIDED AGAINST MILWAUKEE. RATHER ILLINOIS SEEKS TO HAVE THE DISTRICT COURT'S REMEDY UPHELD UNDER THE "CLEARLY ERRONEOUS" RULE OR TO HAVE THE EFFLUENT LIMITS REMEDY REMANDED TO TEST THE EVIDENTIARY BASIS OF THE REMEDY ORDERED BY THE COURT OF APPEALS.

Contrary to Milwaukee's colorful colloquy, Illinois is not seeking to relitigate this case. Milwaukee forgets that:

1. The district court found in Illinois' favor on the question of *liability.* The Court of Appeals affirmed.

2. The district court ordered a remedy requiring the collection and treatment of raw sewage. The Court of Appeals affirmed.

3. The district court ordered a remedy requiring effluent limits sufficient to destroy virus. The Court of Appeals not only rejected evidence sufficient to sustain that order under the "clearly erroneous" rule but went further and adopted its own treatment requirement without any evidence and on the basis of extra record presumptions.

Illinois is not seeking to relitigate the issue of liability. That would be improper. Nor is Illinois seeking to relitigate a remedy ordered by the district court—although changed conditions can support a request to modify a remedial order. Indeed the Judgment Order below specifically provides for modification if subsequent innovation or engineering design develops better or more economical techniques for achieving the same level of disinfection or collection.

What Illinois challenges here is not a district court order based on evidentiary hearings, but rather a Court of Appeals remedial order which conflicts with the uncontroverted evidence in the record and which relies on unfounded extra-record presumptions. At the very least the Court of Appeals should have remanded for further evidence on the level of treatment necessary to destroy virus.

III.

STATE STATUTORY AND COMMON LAW REMEDIES CO-EXIST AND COMPLEMENT THE FEDERAL SCHEME.

Milwaukee and its amici have hoist themselves on their own petard. They have argued themselves into a logical conundrum.

First they argue that the Clear Water Act has preempted or replaced the federal common law of nuisance. Second they argue that the federal common law of nuisance has preempted all claims for relief made under state statute or state common law. But their arguments ignore the explicit and repeated recognition by Congress in the Clear Water Act that state statutory and common law remedies were to be preserved. If the Clean Water Act has indeed precluded the use of federal common law nuisance, that very same Act has reemphasized the right of States to invoke State statutory and common law remedies.

In fact, none of these various remedies are mutually exclusive and all of these remedies should be available to meet localized conditions and the needs of special high quality waters. *Cf.*, *Washington* v. *General Motors Corp.*, 406 U. S. 109, 112 n. 2, 115-16 (1972).

CONCLUSION.

The State of Illinois respectfully submits that the Writ should issue as prayed for in its Petition herein.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS and GAIL LTD.,
150 North Wacker Drive,
Chicago, Illinois 60606,
(312) 782-1905.

November 13, 1979.